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In the Supreme Court of the United States

OCTOBER TERM, 1977

COMMERCIAL NATIONAL BANK OF DALLAS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, which holds a lien on a car, contends that the forfeiture of the automobile deprived it of property without due process of law or just compensation because it was not connected with the illegal acts that precipitated the forfeiture.

On June 24, 1974, Jimmy Ercanbrack bought a new Cadillac Coupe deVille automobile. The Midway National Bank financed the purchase and retained a security interest. On October 13, 1974, Ercanbrack defaulted on the loan and the automobile was repossessed by the bank, which advised Ercanbrack that he had until November 11, 1974 to pay off the entire loan or the car would be sold at auction (Tr. 28-30). Ercanbrack obtained

a second secured loan from petitioner and discharged his debt to Midway National Bank with a cashier's check from petitioner (Tr. 12 30-32).

On October 2, 1975, Ercanbrack was arrested and charged with possession of counterfeit reserve notes, in violation of 18 U.S.C. 472. The automobile, which had been used by Ercanbrack to transport the notes, was seized by the Secret Service for forfeiture. See 49 U.S.C. 781, 31 C.F.R. 401.1-401.3. Ercanbrack subsequently pleaded guilty.

Petitioner was notified of the seizure and filed a petition for remission, pursuant to 19 U.S.C. 1618. On February 11, 1976, the petition was conditionally granted by the District Director of Customs, the car being ordered released upon the payment of $3,221.14 plus reasonable storage charges (J.A. 18). Although requested to respond within 30 days of the decision, petitioner did not do so; nor did it file a supplemental petition for release or appeal the initial ruling to the Regional Commissioner of Customs as provided in the regulations. See 19 C.F.R. 171.33.

On May 6, 1976, forfeiture proceedings were instituted in the United States District Court for the Northern District of Texas. Petitioner intervened and sought possession of the automobile and remission of the forfeiture. At the hearing petitioner asserted that it had no knowledge that the automobile would be used in violation of the law and that it had done everything reasonably possible to avoid having its property put to an unlawful use. The government conceded that petitioner had no actual knowledge that the automobile was or would be used in violation of the law (J.A. 30), but argued that petitioner's negligence in making the loan facilitated the subsequent illegal use of the automobile. The government

showed that records maintained by the State District Court Clerk's Office and available for public inspection revealed that, at the time of the loan, Ercanbrack was on probation for two felony convictions—theft by false pretense (Tr. 26, 34-35, 37). Petitioner's president admitted that if the bank had known this, it would not have made the loan (Tr. 21, 24).

The district court ordered forfeiture (J.A. 64-65). The court determined that although petitioner was an innocent lienholder, its lack of knowledge or involvement in the proscribed use of the automobile was not a defense to a forfeiture action under 49 U.S.C. 782 (J.A. 62). The court of appeals affirmed *per curiam* (Pet. App. A3-A4).

1. Petitioner contends that the forfeiture of the automobile amounts to a deprivation of property without due process or just compensation since it had no knowledge that the car would be used for an illegal purpose and did everything reasonably in its power to prevent such use (Pet. 5-6).

This contention is foreclosed by *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663. *Calero-Toledo* holds that the forfeiture laws can constitutionally be applied to the property of an owner who was not aware of or involved in the act subjecting the property to forfeiture. "[T]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property" (*id.* at 687-688). See also *United States* v. *One 1969 Plymouth Fury Automobile*, 476 F. 2d 960 (C.A. 5), rehearing denied, 509 F. 2d 1324, certiorari denied *sub nom. Ford Motor Credit Company* v. *United States*, 423 U.S. 838; *United States* v. *One 1970 Buick Riviera*, 463 F. 2d 1168 (C.A. 5), certiorari denied *sub nom. National American Bank of*

New Orleans v. *United States*, 409 U.S. 980; *United States* v. *One 1967 Ford Mustang*, 457 F. 2d 931 (C.A. 9), certiorari denied *sub nom. Bank of American National Trust & Savings Assn.* v. *United States*, 409 U.S. 850.

To be sure, in *Calero-Toledo* the Court observed that "serious constitutional questions" might arise from the application of the forfeiture statutes to an owner who proved "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property" (416 U.S. at 689). But that is not this case. While petitioner had no actual knowledge of Ercanbrack's criminal record, his background in commercial crime could easily have been uncovered by the examination of records readily accessible to the public. See *United States* v. *One 1967 Ford Mustang*, *supra*, 457 F. 2d at 932. Moreover, the evidence showed that petitioner violated its own lending policy by making a loan to pay off a debt on a car which it knew had been repossessed. In sum, had petitioner been more cautious, it would not find itself in its present situation.

2. Petitioner's additional contention that the district court erred in declining to review the decision of the District Director of Customs, which conditionally granted the release of the automobile, is likewise without merit (Pet. 10). It is well settled that the decision of the Attorney General or the Secretary of Treasury under 19 U.S.C. 1618 on a petition for remission or mitigation is an unreviewable exercise of discretion. *United States* v *One 1972 Mercedes-Benz* 250, 545 F. 2d 1233, 1236 (C.A. 9); *United States* v. *One 1972 Toyota Mark II*, 505 F. 2d 1162, 1165 (C.A. 8); *United States* v. *One 1970 Buick Riviera*, *supra*, 463 F. 2d at 1170; *United States* v. *Kemp*, 186 F. 2d 808 (C.A. 10). Moreover, even if judicial review

were available, petitioner's failure to exhaust its administrative remedies precluded the development of a record sufficient to permit even limited review. Compare *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410, 420.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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[1]We note that the forfeiture does not affect petitioner's right to full payment from Ercanbrack (J.A. 13). Petitioner has not alleged that Ercanbrack is unable to pay off the loan.

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